Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **AT&T CORP.** ***Complainant,*** ***v.*** **IOWA NETWORK SERVICES, INC.** ***Defendant.***	**Proceeding Number 17-56** **File No. EB-17-MD-001**

OPPOSITION OF AT&T CORP. TO AUREON'S PETITION FOR RECONSIDERATION

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Pursuant to 47 C.F.R. § 1.106(g), Complainant AT&T Corp. ("AT&T") hereby submits this opposition to the Petition for Reconsideration ("Pet.") filed by Defendant Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"). Aureon's Petition lacks merit, and should be dismissed.

INTRODUCTION

In 2011, after public notice and comment, the Commission issued transitional access service pricing rules, which apply to "any local exchange carrier" ("LEC"), and which include rate caps that apply to "all" interstate switched access service.[1] Even though, as the Commission had long ago determined, Aureon is a LEC that provides switched access service, Aureon chose to disregard the rate caps, claiming it was exempt.[2] Remarkably, Aureon simultaneously (i) filed

[1] *See* 47 C.F.R. §51.903(a); *In re Connect America Fund*, 26 FCC Rcd. 17763, ¶ 801 (2011) ("*USF/ICC Transformation Order*") (subsequent history omitted); *see also* 47 C.F.R. § 51.901(b).

[2] *See App. of Iowa Network Access Div.*, 3 FCC Rcd. 1468, ¶ 10 (C.C.B. 1988) ("*INS Order*"); Answer to the Formal Complaint, *AT&T Corp. v. Iowa Network Servs., Inc.*, EB Docket No. 17-56, ¶ 88 (filed Jun. 28, 2017) ("Answer").

switched access tariffs with rates above the caps *and* (ii) asserted that it could file those tariffs on a streamlined basis, which is a procedure open only to "[a] local exchange carrier." *See* 47 U.S.C. § 204(a)(3). In short, Aureon took openly inconsistent legal positions: it sought to be deemed a local exchange carrier providing switched access for some purposes, while refusing to comply with the all of the duties that accompany local exchange carriers providing switched access, namely the rate caps and other applicable transition rules.

In the *Liability Order*, the Commission rejected Aureon's legal position on this issue.[3] The Commission did so, not by changing any established precedents, but by applying the plain terms of its regulations and orders to Aureon. The Commission re-affirmed that Aureon's tariffed rates have long been subject to the requirements of Section 61.38 (47 C.F.R. § 61.38), applicable only to dominant carriers. *Liability Order*, ¶¶ 11, 26. The Commission also re-affirmed that Aureon was a LEC providing switched access, *id.* ¶ 25, and concluded that, as a consequence, Aureon's rates were also subject to the Commission's more general 2011 transitional access service pricing rules, including its rate cap and rate parity rules. *Id.* ¶¶ 23, 25-26. Far from breaking new ground, that ruling was not only foreseeable but in fact preordained by the structure and plain terms of the Commission's transition rules and orders, which, as noted, apply to "any local exchange carrier." 47 C.F.R. § 51.903(a). The transition rules have thus applied to Aureon since they were promulgated in 2011—and, notably, in its Petition, Aureon does not contest the Commission's finding in the *Liability Order* that the caps apply.

Instead, Aureon's primary arguments on reconsideration are that there should be no retroactive adverse consequences for its deliberate decision to ignore the Commission's rate cap

[3] Memorandum Opinion & Order, *AT&T Corp. v. Iowa Network Servs.*, EB Docket No. 17-56 (Nov. 8, 2017) ("*Liability Order*" or "*Order*").

and rate parity rules. *See* Pet. at 5-22. These claims are entirely lacking in merit. For years, Aureon has violated the law by filing tariffs with rates exceeding the rate caps—even as those same tariff filings unequivocally demonstrated that Aureon was providing switched access service as a LEC and was thus subject to the caps. In the *Liability Order*, the Commission found Aureon's above-cap tariff filings to be unlawful and void *ab initio*, and in doing so, it simply applied existing precedents and the unremarkable proposition that "'tariffs still must comply with applicable statutory and regulatory requirements.'" *Id.* ¶ 29 (quoting *Global NAPS v. FCC*, 247 F.3d 252, 260 (D.C. Cir. 2001)).

Aureon nevertheless reiterates its claim (*see* Answer, pp. 97-99) that it lacked "fair notice" of the Commission's liability determinations. Pet. at 5-20. Aureon's position is groundless. As the D.C. Circuit has held, "[r]etroactivity is the norm in agency adjudications," *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006), and "retroactive effect is appropriate for new applications of [existing] law, clarifications, and additions," but not when an agency substitutes "new law for old law that was reasonably clear." *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Pub. Serv. Co. of Colo. v. FERC,* 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

This case clearly involves an "application[] of existing law." *Id.* Aureon points to no reasonably clear law holding that it was exempt from the transition rules and rate caps. To the contrary, Aureon, "received, or should have received, notice of the [Commission's] interpretation in the most obvious way of all: by reading the regulations" and the Commission's other "public statements." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Commission's regulations and public statements clearly provide ample notice that, on "all" tariffed switched access service, "any" LEC is subject to the Commission's rate cap and rate parity rules. 47 C.F.R.

§ 51.903(a); *USF/ICC Transformation Order*, ¶ 801.[4] Nor can Aureon point to any reasonably clear law holding that a carrier's tariff, when filed on a streamlined basis, can override statutory or regulatory requirements like the rate caps at issue here. If anything, the existing precedent is to the contrary, and the most recent authority—the Commission's *amicus* brief regarding CLEC rate caps[5]—requires the same result as the *Liability Order*. Accordingly, there is no due process concern in holding Aureon liable retroactively for its knowing violations of the Commission's rate cap and rate parity rules.

In addition, Aureon again raises its "deemed lawful" defense, as it did in its Answer (¶ 118), arguing that the Commission may not "retroactively void a dominant carrier tariff that is not subject to forbearance." Pet. at 20-22. That argument also lacks merit, as the Commission explained (*see Liability Order*, ¶ 29). The Commission may determine that Aureon's tariffs were subject to forbearance (*see id*. ¶ 24). In any event, carriers plainly lack unilateral authority to amend the Act or the Commission's regulations, and it has long been the law that, when (as here) the Commission exercises ratemaking power to set a specific rate or impose a maximum rate (or rate cap), those determinations are binding on carriers and cannot be modified except by rule or future prescription.[6] Yet, under Aureon's view, a tariff filed on a streamlined basis would have the effect of amending the Commission-determined rate, as well as any statutes or rules that conflict with the filed tariff. That is not a reasonable position, and would completely distort the purpose of the "deemed lawful" doctrine. That doctrine was intended as a shield for LECs, but

[4] Notably, another CEA provider was able to conclude, based on the Commission's regulations, that the rate cap and rate parity rules were applicable to it. *See Liability Order*, ¶ 28.

[5] Brief for *Amicus Curiae* FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25 (3d Cir. Mar. 14, 2012).

[6] *See infra*; *Ariz. Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 383-89 (1932).

Aureon seeks to turn the doctrine into a sword that a LEC could use to amend, in effect, legal obligations with which it disagrees.[7] No authority supports that view, and in the *Liability Order*, the Commission only enforced, as it was required to do, a pre-existing, quasi-legislative regulation that barred the filing of tariffs with rates above a specified cap. The Commission did not improperly engage in any form of retroactive ratemaking, because it had already informed affected carriers that rates above the cap were unreasonable. *USF/ICC Transformation Order*, ¶ 801.

Aureon raises two other grounds for reconsideration, which also lack merit. *First*, Aureon argues that the legal effect of the Commission's holding that Aureon's June 2013 tariff filing was "void *ab initio*" (*Liability Order* ¶ 29) is that the rate in Aureon's July 2012 tariff "is the currently effective and lawful rate." Pet. at ii; *id.* at 4-5. As explained below, this assertion is not accurate. Aureon's 2012 tariff rate is not, and cannot be, the currently effective or lawful rate. Aureon is required, by law, to update its tariff filings periodically, based on revised data. 47 C.F.R. § 69.3(f)(1). In 2013, Aureon concluded (and so stated in its tariff filing seeking to replace its 2012 tariff rate) that the 2012 rate was no longer just and reasonable because of changes in the demand for Aureon's CEA service and other factors.[8] Further, Aureon more recently has taken the position that the data underlying its 2012 tariffed rate may have been inaccurate when the rate was filed in 2012. AT&T Ex. 87, Deposition of Jeff Schill, at 73:21-78:23 ("Schill Dep."). In these circumstances and under the Commission's rules, Aureon's 2012 tariffed rate cannot be the currently effective rate.

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[7] *See PaeTec Commc'ns v. CommPartners, LLC*, No. 08-0397 (JR), 2010 WL 1767193, *4 (D.D.C Feb. 18, 2010) ("[t]o treat tariffs as inviolable would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice.").

[8] AT&T Ex. 20, INS Introduction, Overview and Rate Development, July 2, 2013 FCC Annual Access Charge Filing (filed June 17, 2013) ("INS 2013 Tariff Filing").

Second, Aureon argues that the Commission should determine that Aureon is a "rural CLEC" and that its rate cap should be benchmarked based on NECA rates. Pet. at 22-25. Given the finding in the *Liability Order*, ¶ 24, that the Commission did not have a sufficient record to determine what was the appropriate benchmark under 47 C.F.R. § 51.911(c), resolution of this issue is premature, and should be addressed in the damages phase of the proceeding. In any event, Aureon's position is groundless. CenturyLink is clearly the appropriate benchmark for Aureon, because CenturyLink would provide the access services if Aureon were not doing so. *Cf.* 47 C.F.R. § 61.26(a)(2) (defining benchmark ILEC). Indeed, Aureon was initially created to replace the services of Northwestern Bell, CenturyLink's predecessor. *See INS Order*, ¶ 22. Further, most of the traffic on Aureon's network is benchmarked to CenturyLink's rates, and the only network in Iowa that is comparable to the Aureon network in terms of size, complexity, and volume of traffic transported is the CenturyLink network. Finally, the record evidence shows that NECA carriers cannot possibly be an appropriate benchmark for Aureon's service, because Aureon operates a very different network than NECA carriers.

ARGUMENT

Standard For Reconsideration. Pursuant to Section 1.106 of the Commission's Rules, "[r]econsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters." *GM Corp./Hughes Elec. Corp.*, 23 FCC Rcd. 3131, ¶ 4 (2008). Moreover, it is "settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected." *Qwest Commc'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, 25 FCC Rcd. 3422, ¶ 8 (2010). Under these standards, and as explained below, Aureon presents no valid grounds for the Commission to reconsider the *Liability Order*.

I. AUREON CANNOT RELY ON ITS 2012 TARIFF AS A CURRENT OR LAWFUL RATE.

Aureon argues that, if the Commission adheres to its decision finding Aureon's 2013 tariff to be void *ab initio*, then the Commission should "confirm" that the "currently effective tariff rate is the rate contained in Aureon's 2012 tariff." Pet. at 4.

As an initial matter, this argument should be rejected as premature. In the *Liability Order*, the Commission made no specific determinations as to Aureon's "currently effective tariff rate," and thus there is nothing for the Commission to confirm. Rather, the Commission ordered Aureon "to file a revised interstate tariff with rates that comply with this Order." *Liability Order*, ¶ 35. Because Aureon must comply with both Section 61.38 and the Commission's price cap and rate parity rules, any new tariff must contain rates that comply with both sets of rules. *See id.* ¶ 26. Consequently, Aureon's new tariff rate will thus not be established until Aureon makes such a filing, and until a new rate is permitted to go into effect. Further, in the *Liability Order*, the Commission also did not purport to establish a specific rate for the period after June 17, 2013 and until the date on which a new Aureon tariff goes into effect. Consequently, it is absolutely clear that this aspect of Aureon's request for reconsideration should be denied as premature.

In any event, Aureon's argument is baseless. According to Aureon, because its July 2013 tariff has been declared void *ab initio*, that action "restor[ed] the 2012 tariff rate to its legal *status quo ante*." Pet. at 5. Even assuming, *arguendo*, that the 2012 rate is lower than the applicable benchmark rate, *but see infra*, Part IV, Aureon ignores that, as a dominant carrier, it is required to refile its rates periodically to insure that they properly reflect Aureon's costs of service. *See* 47 C.F.R. § 69.3(a), (f)(1) ("[a] tariff for access service provided by a telephone company that is required to file an access tariff pursuant to § 61.38 of this Chapter shall be filed for a biennial period").

Moreover, in mid-2013, Aureon admitted that its 2012 tariffed rate no longer reflected its cost of service, and it made a rate filing to correct that situation.[9] Further, Aureon recently presented testimony suggesting that the cost support underlying its 2012 rate filing was defective at the time of its filing.[10] These admissions, when coupled with the Commission's periodic rate filing requirement, make clear that Aureon's 2012 tariff rate cannot lawfully become the "currently effective rate." Pet. at 5.

There are numerous additional issues with Aureon's 2012 tariff rate that preclude it from being the "currently effective" rate.[11] During the course of this complaint proceeding, AT&T presented extensive evidence showing problems with Aureon's 2012 tariff rate. *See Liability Order*, ¶ 30. These problems include the fact that Aureon had unlawfully added allegedly "uncollectible revenues" to its revenue requirement, and that it used an improper method of allocating cable and fiber costs to its Access Division, thereby significantly inflating its CEA rates. AT&T pointed out that the cost data included in Aureon's 2012 tariff filing could not be reconciled with the back-up data that Aureon had presented in support of the lease rates that it was charging to its Access Division, among other data discrepancies. As previously noted, these discrepancies eventually forced Aureon's witness to concede that its 2012 tariff rate might never have been accurate.

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[9] AT&T Ex. 20, INS 2013 Tariff Filing.

[10] Schill Dep. at 73:21-78:23.

[11] As noted, once the Commission later decides the applicable benchmark, then if the 2012 rate exceeds that benchmark, that rate cannot be the currently effective rate. *See Liability Order*, ¶ 26. Further, in the damages phase, AT&T intends to assert that Aureon engaged in furtive concealment when making its 2012 tariff filing by, among other things, failing to disclose how it derived its network lease costs, and that the methods it used in that connection were improper. If AT&T prevails on this argument, then the 2012 rate would be unjust and unreasonable (even assuming it was at one time deemed lawful), and, *a fortiori*, could not serve as the currently effective rate.

II. AUREON'S DUE PROCESS CLAIM LACKS MERIT, AND THE *LIABILITY ORDER* DID NOT CHANGE SETTLED LAW OR CREATE MANIFEST INJUSTICE.

Aureon also claims that the Commission violated Aureon's due process rights, by applying the determinations of the *Liability Order* against Aureon without providing "fair notice" of how the Commission's rules would apply to Aureon. Pet. at 5-20. This argument is groundless.

This is a complaint case, and one which arises from a collection action that Aureon instituted in federal court, seeking retroactive relief. As noted above, "[r]etroactivity is the norm in agency adjudications no less than in judicial adjudications." *AT&T*, 454 F.3d at 332. Although the courts of appeals have adopted a variety of formulations to evaluate due process claims in agency adjudications, as a general rule, "retroactive effect is appropriate for new applications of existing law, clarifications, and additions," but not when an agency substitutes "new law for old law that was reasonably clear." *Verizon*, 269 F.3d at 1109.

Accordingly, the *Liability Order* is properly presumed retroactive, unless Aureon can point to a "settled rule on which it reasonably relied" and which the Commission changed in the *Liability Order*. *AT&T*, 454 F.3d at 332. Aureon has not made, and cannot make, such a showing.

Nevertheless, Aureon argues that the Commission did not provide fair notice that it would apply its rate cap and rate parity rules to Aureon, and "classify Aureon as a CLEC" under those rules. *See* Pet., Part II.B.2, at 8-14. That very conclusion, however, is inescapable from the plain text of the Commission's rules and orders. Aureon thus had ample notice from these public materials. *See Gen. Elec.*, 53 F.3d at 1329.

Any reasonable reader of the Commission's regulations and orders would necessarily conclude that Aureon, which "concede[d]" that it was a LEC providing switched access service, *see Liability Order*, ¶ 25; Answer, ¶ 94, is subject to the Commission's transition rules, including the rate cap and rate parity rules. There is nothing vague about the statement in the *USF/ICC*

Transformation Order, that "at the outset of the transition, ***all interstate switched access*** and reciprocal compensation rates ***will be capped*** at rates in effect as of the effective date of the rules." *Id.* ¶ 801 (emphases added). The scope of the Commission's published regulations is also broad and unambiguous.[12] In particular, and as the Commission explained, given Aureon's position that it was a LEC but was not an incumbent LEC (as defined in 47 C.F.R. §51.5), *see* Answer, pp. 92-93, Aureon necessarily is a CLEC for purposes of the transition rules because those rules define CLEC as "*any* local exchange carrier" that is not an ILEC. *Liability Order*, ¶ 25 (emphasis added); 47 C.F.R. § 51.903(a).[13] There is nothing vague (or new) here about the use of the terms "any local exchange carrier." And, as noted above, at least one other centralized equal access provider concluded that it was subject to the rate caps, *see Liability Order*, ¶ 28, and was thus provided fair notice of the applicability of the Commission's rules and orders. In fact, given (i) the clarity of the rules that "any" LEC providing "all" types of switched access is subject to the rate caps; and (ii) Aureon's concessions that it is a LEC providing special access, any Commission finding that Aureon were exempt from the caps would be patently unlawful. Yet, for Aureon's fair notice claim to prevail, it would need to point to reasonably clear law holding that the exact opposite conclusion has consistently been applied. It cannot do so.

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[12] Section 51.901(b), which is entitled "Purpose and scope of transitional access service pricing rules," provides that the Commission's transition rules "apply to reciprocal compensation for telecommunications traffic exchanged between telecommunications providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access." 47 C.F.R. § 51.901(b). Although this provision merely discusses the scope of the rules, the provision clearly should have put Aureon on notice that its interstate and intrastate switched access services were encompassed within the transition rules in Subpart J.

[13] Given Aureon's position that it is neither a "Price Cap LEC" nor a "Rate of Return Carrier" under Subpart J, Aureon necessarily had to be regulated as a "Competitive Local Exchange Carrier" under Subpart J. The alternative would be a free pass for Aureon, which is wholly at odds with the Commission's crystal clear determination that "any LEC" is subject to its rate cap and rate parity rules – a determination that Aureon studiously avoids discussing in its Petition.

In this regard, it does not help Aureon's fair notice claim even if there might have been some ambiguity in other parts of the transition rules, such as whether, for purposes of the transition rules, Aureon should be considered as a "Rate-of Return Carrier" or a "Competitive Local Exchange Carrier."[14] There is nothing at all uncertain that the transition rules apply to "any" LEC and that the rate caps apply to "all" switched access service. As the D.C. Circuit has explained, "clarifying the law and applying that clarification to past behavior are routine functions of adjudication." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

The fundamental difficulty with Aureon's fair notice claim is that it "does not and indeed cannot point . . . to a settled rule on which it reasonably relied." *AT&T*, 454 F.3d at 332. Nothing in the "old law," *i.e.*, the Commission's rules or orders, made it "reasonably clear" (*Verizon*, 269 F.3d at 1109) that Aureon was not subject to the rate cap and rate parity rules. Rather, as explained above, the evidence is to the contrary.

In attempting to avoid this difficulty, Aureon points to various statements, but none come close to establishing the "settled rule" that is necessary under the case law. First, Aureon points to statements the Commission made in 2001, in the *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001). But those statements are largely irrelevant to the issue of whether Aureon received fair notice in 2011 (or thereafter) that it was subject to the Commission's transitional access rules in the *ICC/USF Transformation Order*. In fact, Aureon appears to be conflating its regulatory status under the Commission's 2011 transition rules (Subpart J of Part 51 of the Commission's rules, 47 C.F.R. § 51.901 *et seq.*) with the Commission's regulation of Aureon's tariff filings under Part 61.

[14] *See* 47 C.F.R. §§ 51.903(a), (g) (defining terms "[f]or the purposes of this subpart"). Aureon had conceded that it has been "regulated on a rate-of-return basis" (*see* Legal Analysis in Support of Formal Complaint of AT&T Corp., *AT&T Corp. v. Iowa Network Services, Inc.,* EB Docket No. 17-56, at 32 n.53 (filed Jun. 8, 2017).

With regard to the transitional access service pricing rules, the *Liability Order* classified Aureon as a "Competitive Local Exchange Carrier," *Liability Order*, ¶ 25, which means that (among other things) Aureon's rates must be capped based on the appropriate benchmark rate of the competing ILEC. 47 C.F.R. § 51.911. As to the dominant carrier rules, the Commission re-affirmed in the *Liability Order* that Aureon has been and remains subject to the rules for dominant carriers, including Section 61.38. As a consequence, Aureon's rates also must comply with cost-of-service rate making principles. If the rates as determined under Section 61.38 are lower, they control. That would not be the case if the Commission had determined that Aureon was to be regulated strictly as a CLEC, apart from the transition rules.[15]

Second, Aureon seems to be suggesting that the Commission's past determinations that Aureon is a dominant carrier precludes a finding that Aureon is also subject to the Commission's transition rules, including the rate cap and rate parity rules. Pet. at. 10, 13. However, Aureon's dominant carrier status does not excuse it from complying with the additional duties imposed by more general regulations applicable to any LEC providing switched access service. Dominant carriers have always been subject to more stringent regulation than other carriers, and so Aureon has it backwards. *See Liability Order*, ¶ 26 (although a dominant carrier, "like all LECs, Aureon is subject to additional obligations" such as the rate cap and rate parity rules).

Third, Aureon claims to have had an *ex parte* conversation in April 2017—more than five years after the 2011 transition rules became effective—in which a single, unnamed staff member

[15] Aureon (Pet. at 10) points to language in paragraph 687 of the *USF/ICC Transformation Order* to claim that rate benchmarks did not apply to Section 61.38 carriers, such as Aureon. However, that paragraph appears in the section of the *Order* on access stimulation, and the Commission denied AT&T's access stimulation claim and declined to determine which of the access stimulation rules apply to Aureon. *Liability Order*, ¶ 34 & n.180. Moreover, the paragraph relied on by Aureon does not trump paragraph 801, where the Commission made clear that the rate caps applied to all switched access, or Subpart J, which applies to "any" LEC.

of the Wireline Competition Bureau "stated that Aureon was different from a LEC, and that Aureon could not negotiate a contract to establish its rates." Pet. at 12; Hilton Decl. ¶ 12. This is woefully insufficient to establish Aureon's fair notice claim. To begin with, even if Aureon correctly recalls these hearsay comments, they are not correct statements of the law. In reality, "Aureon is a LEC under Rule 51.5 because it 'provi[des] . . . exchange access.'" *Liability Order*, ¶ 25 (quoting 47 C.F.R. § 51.5, citing 47 U.S.C. 153(20))—indeed, Aureon could not have reasonably relied on such a statement alone, given its prior admission that it "meets the definition of a local exchange carrier," *see Liability Order*, n.136). Further, the Commission's rules also provide that the transition rates specified in Subpart J are "default rates. Notwithstanding any other provision of the Commission's rules, telecommunications carriers may agree to rates different from the default rates." 47 C.F.R. § 51.905(a). Thus, Aureon, like other LECs and/or telecommunications providers, may enter into negotiated agreements. *See USF/ICC Transformation Order*, ¶ 812. In any event, even assuming that the Staff statements as reported by Aureon were accurate, "informal staff guidance cannot bind the Commission." *Id.*, App. E, ¶ 15. In short, nothing that occurred at Aureon's April 2017 meeting with Staff established the settled law that is necessary to support Aureon's fair notice claim.

III. THE COMMISSION PROPERLY FOUND THAT, BECAUSE AUREON IMPROPERLY FILED TARIFFS WITH ABOVE-CAP RATES, AUREON'S TARIFFS WERE UNLAWFUL WHEN FILED AND VOID *AB INITIO*.

Aureon also challenges the *Liability Order's* determination that it is liable since June 2013 for improperly filing tariffs with rates above the Commission's rate cap and rate parity rules, *Liability Order*, ¶ 29; 47 C.F.R. § 51.905(b). Aureon claims that the *Order* is inconsistent with the "deemed lawful" doctrine in Section 204(a)(3), Pet. at 20-22, and also asserts that this aspect

of the *Order* violates the "fair notice" principles discussed above, *see* Pet. at 14-20. Both claims lack merit, and the *Order* properly held Aureon liable for its decision to violate the rate caps.[16]

Aureon's position completely misconstrues the deemed lawful doctrine. That doctrine was designed to limit a customer's judicial (or quasi-judicial) right, which first arose under the common law and was carried forward in Section 201(b) of the Act,[17] to assert that a carrier's filed rate was unreasonably high. Prior to 1996, for all tariffs with rates filed by carriers and not set by the Commission, customers could bring an action under Section 201(b), assert that the carrier's rate was unreasonably high, and obtain damages if they prevailed. *Ariz. Grocery*, 284 U.S. at 384-85. By contrast, once the Commission "fix[ed] the maximum reasonable rate" (or "declare[d] a specific rate to be reasonable"), it acted with "quasi-legislative" authority, "and its pronouncement ha[d] the force of a statute."[18]

The deemed lawful doctrine "significantly" changed the customer's longstanding, quasi-judicial right to assert that a carrier-initiated filed rate was unreasonably high.[19] A customer could

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[16] To the extent that the Commission determines that Aureon violated Section 51.911(c), *Order*, ¶ 24, Aureon would have been required to file tariffs with rates no higher than the applicable competing incumbent local exchange carrier, "in accordance with the same procedures specified in §61.26." 47 C.F.R. § 51.911(c). As Aureon concedes, Pet. at 15 n.50, under the procedures specified in 47 C.F.R. § 61.26, no tariff that exceeds the applicable benchmark can lawfully be filed, and in such circumstances, the Commission has forborne from tariffing requirements, including Section 204(a)(3). Brief for *Amicus Curiae* FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25 (3d Cir. Mar. 14, 2012). Accordingly, the "deemed lawful" doctrine does not apply to the extent Aureon's rates exceed those of the competing ILEC to which Aureon's rates are benchmarked.

[17] *See Ariz. Grocery*, 284 U.S. at 383-85.

[18] *Id.* at 386-87; *Verizon*, 269 F.3d at 1108 (in *Ariz. Grocery*, the "Court recognized that ratemaking—fixing rates or rate limits for the future—is a legislative function, and held that once the Commission had exercised such a power it could only undo the results prospectively") (quoting *Ariz. Grocery*, 284, at 388-89).

[19] *See In re Implementation of Section 402(b)(1) (A) of the Telecommunications Act of 1996, Report and Order*, 12 FCC Rcd 2170, ¶ 20 (1997).

still bring such an action, but the remedy, as to any carrier-initiated rate filed on a streamlined basis, would be prospective only. By "deeming" a streamlined tariff "lawful," Section 204(a)(3) provides that such a tariff "is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)." *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) ("*Vitelco*"). Under this new provision, the traditional, quasi-judicial remedy under § 201(b) for refunds of carrier-initiated rates was modified, and viewed as "impermissible as a form of retroactive rulemaking." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002).

Nothing in Section 204(a)(3) or the deemed lawful doctrine, however, addresses or limits the Commission's quasi-legislative authority,[20] which allows the Commission to fix rates or rate limits for the future, and which necessarily supplants rates set by carriers: "[s]pecific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rate." *Ariz. Grocery*, 284 U.S. at 387; *see id*. at 388 ("the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is a legislative quality as is the fixing of a specified rate").

At issue here are maximum rate caps that the Commission set, via notice-and-comment rulemaking, in 2011. *USF/Transformation Order*, ¶ 801. In setting those rate caps, the Commission was acting in its "quasi-legislative" capacity, and the rate caps thus "take the place of the legal tariff rates" that carriers had previously set. Those rate caps represent the Commission's quasi-legislative judgment that rates above the cap are not reasonable, and would

[20] *See Verizon*, 269 F.3d at 1108 ("there is an important distinction between rules resulting from quasi-adjudication and rules resulting from quasi-legislation"); *Ariz. Grocery*, 284 U.S. at 388-89 ("the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts, and may involve a liability to pay reparation;" the Commission also been delegated "undoubted power" to set rates for the future).

encourage arbitrage. *Id.* ¶¶ 800-01, 808 & n.1494. Further, once the Commission issued these rate caps, "its pronouncement has the force of a statute" and carriers "were bound to conform." *Ariz. Grocery*, 284 U.S. at 386-87. Moreover, once the Commission acts in its ratemaking authority to set a specific or maximum rate, "it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." *Id.* at 389. Accordingly, once the Commission (properly) found that Aureon was subject to the rate caps, the Commission was obligated to apply the rate caps in quasi-judicial proceedings like this one. Thus, far from retroactively voiding a "deemed lawful" rate, the Commission in the *Liability Order* instead properly insisted on the supremacy of the rate caps it had previously implemented using its quasi-legislative, ratemaking power delegated by Congress.[21]

Under Aureon's view of the "deemed lawful" doctrine, Section 204(a)(3) would provide LECs with the power to alter the Commission's ratemaking authority—or indeed, any legal obligation. In effect, the Commission's quasi-legislative rate caps were altered, in Aureon's view, when Aureon elected to ignore those caps and file tariffs with above-cap rates and those tariffs went into effect without being suspended. This is an unreasonable interpretation of Section 204(a)(3) that would lead to bizarre and perverse results if it were the law. Take, for example, a situation where a carrier filed a tariff providing that customer A (or, even more pernicious, customers of a certain political party, race or gender) must pay $1 for service, but customer B (or customers of different political parties, races or gender) must pay $5 for the same service. Under Aureon's extreme view of Section 204(a)(3), the carrier, so long as the tariff is not suspended, is

[21] As to the rate cap violation, AT&T's formal complaint, while it opened an adjudication, sought to enforce the Commission's quasi-legislative rate cap and rate parity rules.

bound to charge the disparate and unlawful rates. *See* Pet. at 21. This would plainly be an absurd result, and Congress could not have intended it when enacting Section 204(a)(3).

Further, Aureon provides no authority to support its expansive view of § 204(a)(3). In contrast to this case, the few cases applying Section 204(a)(3) and the "deemed lawful" doctrine involve quasi-judicial claims by a customer, under Section 201(b), that a carrier-filed rate (or rate-of-return) was unreasonable. In those cases, the courts properly found that this quasi-judicial claim against carrier-filed rates was limited to prospective relief. *ACS*, 290 F.3d at 408 (customer filed a complaint alleging a rate-of-return violation of a carrier filed rate); *Vitelco*, 444 F.3d at 668, 669, 671 n.4 (after tariff suspension order was reconsidered, customer filed a complaint for overearnings of a carrier filed rate). Notably, the D.C. Circuit in *ACS* emphasized that "it is virtually impossible to tell in advance just what rate of return a given rate may yield," and thus neither the carrier, the Commission or the customer could tell, at the time the tariff rate was filed, that it would ultimately lead to a rate-of-return that was unlawful. *ACS*, 290 F.3d at 413.[22] Here, by contrast, Aureon knew that the rate caps applied to "any" LEC providing switched access service, and thus it knew, or should have known, that its tariff filings were subject to, and inconsistent with, the Commission's rate cap and rate parity rules. No case law supports the view that, by filing a tariff under Section 204(a)(3) with above-cap rates, Aureon could effectively amend the Commission's rate caps, and thereby insulate itself from retroactive liability for its unlawful tariff filing.

As the *Liability Order* held, it is well-established that "tariffs still must comply with applicable statutory and regulatory requirements," and "[t]hose that do not may be declared

[22] Thus, while the Commission had prescribed a specific maximum rate of return for the carriers, it left "it to the carrier to set its rates." *Vitelco*, 444 F.3d at 669. The specific rates at issue were deemed lawful and were carrier-initiated, not set by the Commission.

invalid." *Liability Order*, ¶ 29 (quoting *Global NAPS*, 247 F.3d at 260). Here, the Commission issued rate caps that squarely apply to Aureon's switched access services, and also promulgated a separate rule that unambiguously precludes Aureon from filing tariffs with rates that exceeded those rate caps. 47 U.S.C. § 51.905(b). The "deemed lawful" doctrine does not alter these rules. While it prevents refunds for a customer claiming a carrier-filed rate is unreasonable under Section 201(b), the doctrine does not authorize carriers to violate applicable statutory and regulatory requirements—like the rate cap and rate parity rules—merely by filing a tariff.[23]

Although the Commission can elect to suspend and investigate a filed tariff, and thereby prevent the tariff from becoming deemed lawful, that procedure is not necessary where—as here—the Commission has already used its ratemaking authority to determine that rates above a specified level are improper and unlawful. *USF/ICC Transformation Order*, ¶ 801. In such cases, it would be highly inefficient also to require the Commission to review every tariff filing within 15 days to determine whether the LEC is abiding by the Commission's rules. Putting to one side the utter impracticality of reviewing the many hundreds of access tariffs filed in the fifteen days before they go into effect, such a requirement would also encourage unscrupulous LECs to ignore the Commission's rules in the hopes that their tariffs would not be suspended. Facilitating such gamesmanship could not have been Congress's purpose in enacting Section 204(a)(3).

In light of the foregoing, there is also no merit to Aureon's additional claim that the *Liability Order* did not provide fair notice that its above-cap tariff would be declared unlawful and

[23] Contrary to Aureon's claims, nothing in the *Liability Order* makes "Section 204(a)(3) impotent and meaningless." Pet. at 22. Section 204(a)(3), and the "deemed lawful" doctrine, continue to apply to prevent refunds for a customer claiming a carrier-filed rate is unreasonable under Section 201(b). To the extent a carrier fully complies with the rate caps, and a customer complains that the tariff rates should be even lower under Section 201(b), then the deemed lawful doctrine continues to apply.

void *ab initio*. *See* Pet. at 14-20. As with its other fair notice claims, Aureon can point to no reasonably settled "old" law providing that a carrier electing to file a tariff in violation of a Commission rate cap can charge the above-cap rates unless the tariff is suspended. To the contrary, the settled law since at least the time of *Ariz. Grocery* is that, when the Commission sets a legislative-type rate, a carrier "is bound to conform to the order of the Commission." *Ariz. Grocery*, 284 U.S. at 387. Further, the enactment of Section 204(a)(3) did not alter *Ariz. Grocery*, and, as discussed above, the cases applying the "deemed lawful" doctrine do not hold that carriers' streamlined tariffs may violate statutory or regulatory requirements; rather, they limit the relief available in a complaint case when a carrier has set a rate under § 204(a)(3), and the rate, or rate-of-return, is *later* found unreasonable by the Commission. That did not happen here.

Finally, as Aureon admits, Pet. at 15 n.50, there is also recent authority—in the form of a Commission *amicus* brief—holding that it is necessary to "void" the tariffs of CLECs when they violate the rate caps in Section 61.26.[24] As noted above, to the extent Aureon violated Section 51.911(c), which incorporates the procedures of Section 61.26, and filed a tariff with rates that exceed those of the relevant competing ILEC, then Aureon's tariffs would be unlawful under the benchmarking rules and forbearance authority discussed in the Commission's *amicus* brief. In any event, it would not be sensible if the rules for CLECs were more stringent than the rules for dominant carriers. However, under Aureon's view, when a CLEC violates the applicable benchmark, its tariff is properly declared void, but when Aureon, a dominant carrier, does so, there is no retroactive consequence. That is not a reasonable result.

[24] Brief for *Amicus Curiae* FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25 (3d Cir. Mar. 14, 2012) (a tariff that is unlawfully filed under the FCC's CLEC benchmark rules should be declared "void ab initio").

IV. AT THE PROPER TIME, THE COMMISSION SHOULDREJECT AUREON'S CLAIM THAT THE APPLICABLE BENCHMARK RATE IS BASED ON NECA'S RATES.

Aureon's final argument is that the "Commission [should] reconsider its decision to not specify the CLEC rate benchmark that it intends to apply to Aureon's tariff rates," and that the Commission should use a NECA rate as the appropriate benchmark. Pet. at 22-25. This claim should be rejected.

In the *Liability Order*, the Commission declined to "reach the issue of whether Aureon's rates violate Rule 51.911(c) because we do not have an adequate record to determine the pertinent benchmark rate." *Id.* ¶ 24. Section 51.911(c) provides in relevant part that, "[b]eginning July 1, 2013, notwithstanding any other provision of the Commission's rules," all rates for switched access service tariffed by a "Competitive Local Exchange Carrier"—which Aureon is—"shall be no higher than" the applicable rates "charged by the competing incumbent local exchange carrier, in accordance with the same procedures specified in §61.26 of this chapter." 47 C.F.R. § 51.911(c). Aureon's Petition provides no grounds for reconsideration, because Aureon's "showing" certainly does not create the "adequate record" that the Commission found to be lacking. Accordingly, the Commission should deny reconsideration, and decide this issue in the damages phase of the proceeding.

Moreover, Aureon's argument that a NECA rate would be the proper benchmark rate for Aureon's services is entirely lacking in merit. *First*, contrary to Aureon's position (Pet. at 24), CenturyLink, rather than a NECA carrier, is the appropriate "competing ILEC" for Aureon within the meaning of Section 51.911(c). Although Section 51.911(c) does not define the term "competing ILEC," the rule refers to Section 61.26, which defines that term as the ILEC that "would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC." 47 C.F.R. § 61.26(a)(2). Aureon's claim that the competing

ILECs are "those ILECs that subtend Aureon's network" (Pet. at 24) is off-base. Rather, the competing ILEC is plainly CenturyLink, which has a network capable of providing the same services as Aureon's Access Division.

Aureon's arguments also fly in the face of history. Aureon was created primarily as a substitute for Northwestern Bell, *i.e.*, CenturyLink's predecessor. *See INS Order*, ¶ 22. Moreover, unlike CenturyLink, the ILECs subtending Aureon typically do not operate tandem switches or state-wide transport facilities at all, and thus could not provide the tandem and transport services if Aureon did not. *See id.* ¶ 26; *see also AT&T Corp. v. Alpine Commc'ns, Inc.*, 27 FCC Rcd. 11511, ¶ 34 (2011) (subtending ILECs participating in the NECA tariff could not, under that tariff, provide interLATA transport). Aureon's claim also ignores that fact that most of the traffic on its network is transported to CLECs engaged in access stimulation, whose rates are benchmarked to CenturyLink's rates. Finally, the size and complexity of Aureon's network, as well as the volumes of traffic transported over that network, look nothing like the networks and traffic volumes of NECA carriers, most of which are small rural carriers. The more comparable network is undoubtedly CenturyLink's network.

Second, Aureon argues that a NECA rate is the proper benchmark because Aureon "qualifies for the rural exemption in Section 61.26(e)." Pet. at 22. Aureon's claim is wrong. Under Section 51.911(c), Aureon's benchmark rates are the applicable rates "charged by the competing incumbent local exchange carrier, in accordance with the same procedures specified in §61.26 of this chapter." 47 C.F.R. § 51.911(c). According to the procedures of Section 61.26, subsection (f) applies to Aureon, because that is the subsection applicable to carriers that provide only "some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC." *Id.* § 61.26(f); *see AT&T Servs. Inc. v. Great Lakes Comnet, Inc.*,

30 FCC Rcd. 2586, ¶ 20 (2015) ("*Great Lakes Comnet Order*"). Paragraph (f) does not include any rural exemption.

The "rural exemption," which appears in paragraph (e), does not modify paragraph (f) and instead, by its plain terms, modifies only the rules that appear in "paragraphs (b) through (d) of this section [61.26]." 47 C.F.R. § 61.26(e). Consequently, the rural exemption *does not* modify the cap applicable to intermediate carriers in paragraph (f).[25] This is borne out by considering how Section 61.26 has been revised over time: in 2004, the Commission amended Section 61.26 in two relevant respects: (i) it added paragraph (f) to govern access charges by intermediate carriers that do not serve their own end users, and (ii) it modified the scope of the rural exemption so that qualifying "rural CLECs" would be exempt from "paragraphs (b) through (d) of [Section 61.26]." *Eighth Report & Order*, 19 FCC Rcd. 9108, App. A (2004). By exempting rural CLECs from paragraphs (b) through (d), the Commission expressly chose not to exempt rural CLECs from the rules governing access charges assessed by intermediate carriers pursuant to paragraph (f). *Id.*[26]

Further, even if the rural exemption were not so limited, Aureon does not qualify as a "rural CLEC" according to the procedures in Section 61.26. Aureon claims that because "it does not serve any end users, it is by definition a rural CLEC." Pet. at 23. But that claim is not correct:

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[25] It is entirely consistent with the "narrow" purpose of the rural exemption (*Eighth Report & Order*, ¶ 37) to exclude its application to intermediate carriers like Aureon that do not serve end users. As the Commission explained, "[t]he rural exemption was intended" to benefit "rural competitive LECs with high loop costs." *Id.* ¶ 35. Aureon and other intermediate carries have no loop costs and thus are outside the intended scope of the rural exemption.

[26] The rural exemption also does not modify the cap for CLECs that engage in access stimulation which appears in paragraph (g). In 2011, when the Commission added paragraph (g) to address access charges by CLECs engaged in access stimulation, the Commission again modified the rural exemption to make clear that rural CLECs would not be exempt from the access stimulation provisions in paragraph (g). *See USF/ICC Transformation Order*, ¶¶ 663, 666, 689. At the same time, the Commission retained the prior language in paragraph (e) that exempted rural CLECs from only "paragraphs (b) through (d) of this section." 47 C.F.R. § 61.26(e).

the Commission did not declare all "CLECs that do not serve end users" to be rural. Just the opposite: the Commission stated that the rural exemption applies only to CLECs that serve end users, so long as the end users are all in rural areas. *See* 47 C.F.R. § 61.26(a)(6). Indeed, Aureon's reading of the rural exemption would lead to absurd results: under its theory, all CLECs that "do not serve end users" are rural, no matter where they operate. Thus, an intermediate access provider which operates entirely in Times Square in New York or in the Sears Tower in Chicago would be deemed a rural CLEC so long as it did not serve end users there. That is plainly inconsistent with the narrow and very limited purposes of the rural exemption.

Respectfully submitted,

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Dated: December 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I caused a copy of the foregoing Opposition of AT&T Corp. to Aureon's Petition for Reconsideration to be served as indicated below to the following:

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